Supreme Court, U.S.
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No. 01-800

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

KAREN HOWSAM,

Petitioner,

v.

DEAN WITTER REYNOLDS INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT

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July 22, 2002

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QUESTION PRESENTED

Whether a court or an arbitration panel should determine the eligibility of petitioner's claims for submission to arbitration.

RULE 29.6 STATEMENT

Respondent Dean Witter Reynolds Inc. ("Dean Witter") is now known as Morgan Stanley DW Inc., and is wholly owned by Morgan Stanley, which is a publicly traded company.

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INTRODUCTION

The purpose of the Federal Arbitration Act, or "FAA," is to ensure judicial enforcement of arbitration agreements according to their terms. Consistent with that purpose, this Court has long held that "whether or not [a party] [i]s bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court," rather than an arbitration panel, "[u]nless the parties clearly and unmistakably provide otherwise." *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986) (internal quotes omitted).

In this case, the parties agreed not to arbitrate disputes more than six years old by incorporating into their agreement the National Association of Securities Dealers Code of Arbitration Procedure ("NASD Code"). Section 10304 of the NASD Code provides that "[n]o dispute" more than six years old "shall be eligible for submission to arbitration." Because this provision expressly precludes the *submission* of such claims to arbitration, it "can reasonably be read in only one way—as a substantive limit on the claims that the parties have contracted to submit to arbitration." *PaineWebber Inc. v. Hofmann*, 984 F.2d 1372, 1379 (3d Cir. 1993) (Becker, J.). The NASD itself has confirmed this point by explaining that Section 10304 is a "jurisdictional time limitation on the dispute[s] that could be arbitrated." 63 Fed. Reg. 588, 592 (Jan. 6, 1998).

As a threshold restriction on the arbitrability of particular disputes, Section 10304 is to be enforced by a court, not by an arbitration panel, unless the parties "clearly and unmistakably provide[d] otherwise." *AT&T*, 475 U.S. at 649. They did not. Nothing in the parties' arbitration agreement or the NASD Code evidences a "clear and unmistakable" intent that arbitrators are to decide the threshold question of arbitrability. The general provision upon which petitioner relies, stating that "all" disputes on

certain subjects are within the scope of arbitration, cannot trump the specific exclusion in Section 10304, and does not command that arbitrators decide their own jurisdiction.

Judicial enforcement of Section 10304 is necessary to effectuate its purpose. While securities claims are generally well-suited to arbitration, Section 10304 recognizes that long-stale claims are not. Arbitration is an equitable process, such that arbitrators are less inclined to follow bright-line rules such as statutes of limitations, and tend to proceed to the merits of even stale claims. Arbitral consideration of such claims is fundamentally unfair to parties that may no longer have access to materials needed to defend themselves because of the passage of time. Section 10304 was designed to address precisely this unfairness by ensuring that, after a certain point, long-stale disputes are no longer "eligible for submission to arbitration."

COUNTERSTATEMENT OF THE CASE

A. Petitioner's Claims

In 1992, the parties executed a customer service agreement that generally requires them to arbitrate disputes "before any self-regulatory organization or exchange of which Dean Witter is a member." Pet. App. 3; J.A. 6-7. In 1997, petitioner filed a Submission Agreement and a Statement of Claim with the NASD. *See* Pet. App. 4. In her Submission Agreement, petitioner represented that she had "read the procedures and rules of the [NASD] relating to arbitration," and agreed "to arbitration in accordance with the [NASD] Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure." *Id.* at 4-5; J.A. 24. The NASD Code specifies that:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

NASD Code § 10304; J.A. 48.

Petitioner's Amended Statement of Claim alleges that in 1986—eleven years before petitioner filed her claim—Dean Witter and two of its brokers "breached their duty to recommend and sell only suitable investments" to petitioner. J.A. 20; *see also id.* at 8, 9, 10, 12, 20. Petitioner asserted that the investments were unsuitable in 1986 because they allegedly were dependent upon the performance of real estate markets, were illiquid and risky, and entailed excessive commissions and fees. *See id.* at 20.

B. The District Court Proceedings

Dean Witter filed a complaint in the United States District Court for the District of Colorado requesting declaratory and injunctive relief against the arbitration proceeding. *See* Pet. App. 5-6; J.A. 39-46. Dean Witter explained that petitioner's eleven-year-old claims are not eligible for submission to arbitration because they arose more than six years before she attempted to submit them to arbitration. J.A. 41-42.

Petitioner moved to dismiss the complaint on the ground that the parties had clearly and unmistakably agreed to arbitrate arbitrability issues. For that proposition, she relied on a New York case holding that, while Section 10304 presents an arbitrability issue, the parties in that case had clearly and unmistakably manifested an intent that arbitrators should decide the issue. *See Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997). Dean Witter responded that this case is controlled by federal law, and that nothing in the parties' agreements clearly and unmistakably provides that arbitrators should determine arbitrability.

The district court (Miller, J.) agreed with petitioner and dismissed Dean Witter's complaint. *See* Pet. App. 31-37. The court determined that the parties' 1992 customer service agreement clearly and unmistakably manifests an intent to arbitrate arbitrability by requiring the parties to arbitrate "'all controversies' arising from their relationship" and stating that "'[t]he parties are waiving their right to seek remedies in court, including the right to a jury trial.'" *Id.* at 34 (quoting J.A. 6).

C. The Court of Appeals' Decision

The court of appeals (Ebel, J., joined by Lucero and Vratil, JJ.), reversed. *See id.* at 1-30. The court first examined this Court's long-established holding that "the question of whether the parties agreed to arbitrate [a particular claim] is to be decided by the court, not the arbitrator," "'[u]nless the parties clearly and unmistakably provide otherwise.'" *Id.* at 16 (quoting *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648, 649 (1986)). The court of appeals noted that it had previously decided that this standard applies to NASD Code § 10304. *See id.* at 17-19 (citing *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith*, 78 F.3d 474, 478 (10th Cir. 1996)). The court explained that, in *Cogswell*, it had "analyz[ed] the specific language" of Section 10304 and concluded that it "'can reasonably be read in only one way—as a substantive limit on the claims that the parties have contracted to submit to arbitration.'" *Id.* at 18 (quoting *Cogswell*, 78 F.3d at 479). Thus, the *Cogswell* court had "adopted the majority view that the courts, and not arbitrators, should determine the arbitrability under NASD Code § 10304 of disputes submitted to arbitration, absent a 'clear and unmistakable' agreement to the contrary." *Id.*

Turning to this case, the court of appeals held that the parties had not clearly and unmistakably provided that arbitrators should decide arbitrability issues. The court

stressed that "the Supreme Court has stated that silence or ambiguity about the question who (primarily) should decide arbitrability should not be viewed as giving the arbitrators that power." *Id.* at 24 (internal quotation omitted). Instead, the "clear and unmistakable" standard is intentionally a "stringent" one because of "the particular difficulty in allowing arbitrators to decide the scope of their own jurisdiction." *Id.* at 16, 17.

On the facts of this case, the court of appeals held that the parties had not manifested a clear and unmistakable intent to allow arbitrators to decide arbitrability. The court explained that none of the contract provisions or NASD rules "refer[s] specifically to arbitrability." *Id.* at 27. The court of appeals was especially critical of the district court's reliance on a contract provision stating that the parties "waiv[ed] their right to seek remedies in court, including the right to a jury trial." *Id.* The court explained that "[a]t most, this language is ambiguous," given that an overly broad reading "would essentially nullify Howsam's arbitration rights entirely" by preventing her from seeking "an order compelling arbitration" or from obtaining "judicial enforcement of an arbitration award." *Id.* at 27-28. This, the court concluded, would prove too much. *See id.*

Finally, the court held that its conclusion was not affected by the New York Court of Appeals' decision in *Sacharow*. *See id.* at 19-24. The court explained that Dean Witter's complaint arises under the FAA, which "'create[s] a body of federal substantive law of arbitrability.'" *Id.* at 20 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Thus, federal, not state, law controls. *See id.* at 23-24. Moreover, the court of appeals determined that "the *Sacharow* court gave insubstantial weight to the presumption established in *First Options* that parties to arbitration agreements generally intend arbitrability questions to be resolved by the courts." *Id.* at 24

n.7. Accordingly, the Tenth Circuit reversed and remanded. *Id.* at 30.

SUMMARY OF ARGUMENT

The court of appeals correctly held that courts, not arbitrators, should determine whether petitioner's claims are "eligible for submission to arbitration" under NASD Code § 10304. As this Court has explained, the "question of arbitrability—whether [the parties' agreement] creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination." *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986). Although parties could contractually agree to allow arbitrators to decide arbitrability issues, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (quoting *AT&T*, 475 U.S. at 649). There is no such "clear and unmistakable" evidence here.

It is undisputed that the parties agreed to be bound by the NASD Code, such that "the parties' agreement and the arbitration code should be read together as a whole." Pet. Br. 33. It is also undisputed that Section 10304 of the NASD Code provides that disputes more than six years old are not "eligible for submission to arbitration." NASD Code § 10304. This textual articulation of a categorical exclusion of claims from arbitration is manifestly clear. Section 10304 pointedly excludes a specific class of claims—those more than six years old—from the scope of the parties' arbitration agreement. Under *First Options* and *AT&T*, this limitation is as fully enforceable as any other limitation on the scope of an arbitration agreement.

Indeed, the text, structure, and purpose of Section 10304 all point ineluctably to a clearly articulated intent to limit the arbitrability of stale disputes, not (as petitioner would have

it) to provide a statute-of-limitations defense for arbitrators to consider as part of an arbitration. The plain meaning of "[in]eligible for submission to arbitration" is that a dispute should not go to arbitration at all; it surely does not mean that the dispute should be submitted to arbitration, and then, after submission, the arbitrators should rule in the defendant's favor on timeliness grounds. Structural analysis confirms this point, as other portions of Section 10304 stress that the "applicable statute of limitations" derives from a different source of law, not from Section 10304 itself. Any lingering textual doubt is resolved by Section 10304's purpose "to prevent aged claims from being litigated *in arbitration*" because "the inherently equitable nature *of arbitration* pose[s] a greater risk that arbitrators might not strictly apply legal defenses such as statutes of limitation." 63 Fed. Reg. 588, 590 (Jan. 6, 1998) (emphasis added). Thus, as the NASD has explained, Section 10304 is a "jurisdictional time limitation on the dispute[s] that could be arbitrated." *Id.* at 592.

Petitioner attempts to evade this textually impelled conclusion by arguing that the "arbitrability" issues decided by courts are narrowly limited to the questions (i) whether the parties entered into an arbitration agreement, and (ii) whether the parties' dispute falls within the general "subject matter" of that agreement. This effort to circumvent judicial review has no foundation in law or policy. Fundamentally, judicial enforcement of arbitrability limitations is designed to protect parties from being forced to arbitrate disputes they did not agree to arbitrate. As a result, this Court has always recognized that the "arbitrability" inquiry entails consideration of *all* limitations on the scope of an arbitration agreement, not only those that petitioner would characterize as "subject matter" limits. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995). Petitioner's contrary position would not only artificially limit judicial protection against non-consensual arbitration, it

would also raise at least as many questions as it answers by relying on a semantic "subject matter" distinction that lacks both clarity and predictability of application.

By denigrating the parties' expressed intent in favor of an artificial "subject matter" test, petitioner would also jeopardize the rights of all parties to arbitration agreements— particularly (and ironically) consumers, who are the least likely to be sophisticated in legal matters and therefore the most likely to rely on the plain language of their agreements. While petitioner expresses concern that a threshold judicial determination could delay commencement of the arbitration process, it is in fact petitioner's approach that would spawn significant delay and expense. Unlike courts, arbitration panels "tend to delay eligibility decisions until the hearing on the merits," and thereby fail to provide an efficient threshold determination. 63 Fed. Reg. at 590. The best way to facilitate the dispute-resolution process is to interpret arbitration agreements faithfully in accordance with their terms, rather than to craft artificial rules such as petitioner's proposed "subject matter" test. As this Court has explained, the creation of a "new, unfamiliar test" in this area would "unnecessarily complicat[e] the law, and breed[] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995).

Because Section 10304 limits the "arbitrability" of disputes, it should be applied by a court, not an arbitration panel, unless the parties clearly and unmistakably agreed otherwise. They did not. By adopting Section 10304, the parties evidenced an intent that courts, not arbitrators, should apply the six-year time-bar. The other provisions relied on by petitioner are irrelevant because they do not specifically address the question who decides eligibility. Thus, they cannot overcome the *AT&T/First Options* presumption. Petitioner's purported reliance on New York state law is especially unavailing because this case is governed by federal (not state) law, and the New York case on which she

relies was decided under a mistaken view of federal (not state) law in any event.

While the court of appeals' decision is correct under this Court's precedents, the Court should dismiss the petition as improvidently granted. Since the Court granted *certiorari*, the NASD and the SEC have taken steps to amend Section 10304. As a result, a decision in this case would have little practical significance. The matter surely no longer rises to the level demanded by Rule 10. *See* S. Ct. R. 10.

ARGUMENT

I. A COURT MUST DECIDE WHETHER PETITIONER'S CLAIM IS ELIGIBLE FOR SUBMISSION TO ARBITRATION UNDER NASD CODE § 10304.

Federal law provides that parties cannot be compelled to arbitrate disputes unless they have agreed to do so. To ensure that a dispute is not submitted to arbitration in contravention of the parties' agreement, a court in the first instance must determine the arbitrability of a particular dispute unless the agreement expresses a clear and unmistakable intent that arbitrators should make that threshold determination.

Here, the parties agreed to be bound by Section 10304 of the NASD Code. Section 10304 expressly states that "[n]o dispute" more than six years old "shall be eligible for submission to arbitration." Nowhere in their agreement did the parties "clearly and unmistakably" provide that arbitrators, and not a court, would enforce this limitation on arbitrability. Accordingly, the court of appeals correctly held that a court must determine whether petitioner's claim is eligible for submission to arbitration under Section 10304.

A. Courts decide issues of arbitrability absent "clear and unmistakable" intent to the contrary.

Two fundamental principles of federal law govern resolution of this case. First, the parties to an arbitration agreement are free to limit the scope of arbitration in any way they choose, and all limitations on the scope of arbitration are to be enforced according to the terms of the parties' agreement. Under the FAA, arbitration "is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (emphasis added); *accord, e.g., AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986). Because arbitration is a matter of contract, the intent of the contracting parties—as expressed in the terms of the arbitration agreement—determines the extent of a party's duty to arbitrate. The FAA does not "prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." *Volt Info. Sciences, Inc. v. Board of Trs. of Stanford Univ.*, 489 U.S. 468, 478 (1989). Nor does it prevent parties from excluding specific "issues" from their arbitration obligations. *First Options*, 514 U.S. at 945. And "[j]ust as [parties] may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479.

Second, to ensure that parties are not subjected to arbitration beyond the scope of their agreement, federal law presumes that a court in the first instance, rather than arbitrators, will make the threshold determination whether a particular dispute is within the scope of arbitration. As this Court has explained, the "question of arbitrability—whether [the parties' agreement] creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination." *AT&T*, 475 U.S. at 649. Thus, "whether or not [a party] [i]s bound to arbitrate, *as well as*

what issues it must arbitrate, is a matter to be determined by the Court." *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962) (emphasis added); *see also International Union of Operating Eng'rs v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964); *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). As with other arbitration issues, parties are free to express a contrary intent, but "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless—there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options*, 514 U.S. at 944 (quoting *AT&T*, 475 U.S. at 649).

The presumption that courts, not arbitrators, will decide issues of arbitrability is exceedingly difficult to overcome. As this Court has explained, "[t]he willingness of parties to enter into agreements that provide for arbitration of specified disputes would be drastically reduced … if [an] arbitrator had the power to determine his own jurisdiction." *AT&T*, 475 U.S. at 651 (internal quotation omitted). Arbitrators would be able to assert jurisdiction against parties' wills and render virtually unreviewable decisions on any number of issues affecting the parties' livelihoods. *See id.* Because judicial enforcement of the limitations on arbitration agreements increases the willingness of parties to enter into such agreements, it is emphatically pro-arbitration.

Although conceivably parties might desire that arbitrators resolve arbitrability issues, it cannot be assumed in the absence of an affirmative and specific expression of intent that any party would deliberately choose that course. Indeed, it is likely that "[a] party often might not focus upon th[e] question [of who decides arbitrability] or upon the significance of having arbitrators decide the scope of their own powers." *First Options*, 514 U.S. at 945. This is particularly true for individual consumers and others who are not sophisticated in legal matters. *See generally* Br. for *Amici Curiae* Trial Lawyers for Public Justice and AARP.

As a result, "silence or ambiguity" in the parties' agreement is insufficient to permit arbitrators to determine their own jurisdiction. *First Options*, 514 U.S. at 945. Only a "clear and unmistakable" expression of intent can divest a party of the protections that come with judicial enforcement of threshold limits on arbitrability. *Id.* at 944 (brackets omitted).

B. Section 10304 is a restriction on "arbitrability."

Under these principles, Section 10304 presents an "arbitrability" issue presumptively for judicial resolution. It is common ground that the parties agreed to be bound by the NASD Code, including Section 10304. *See* Pet. Br. 32, 33; *see also* SEC Br. 9 ("The agreement … incorporates all the NASD arbitration rules"). Petitioner has never disputed this point, in the district court, in the court of appeals, or in this Court. To the contrary, she has acknowledged that "the parties' agreement and the arbitration code should be read together as a whole." Pet. Br. 33; *see also id.* at 32 ("pre-dispute arbitration agreements and the Code should be construed as a single writing and interpreted as a whole").

Read in this manner, the arbitration agreement and the NASD Code provide that certain disputes are eligible for submission to arbitration *unless* they are more than six years old. The parties' 1992 agreement states that, in general, "all controversies" of certain types should be arbitrated. *See* Pet. App. 3-4; J.A. 6-7. Section 10304 then provides a specific exception to this general rule by stating that "*[n]o* dispute, claim, or controversy shall be eligible for submission to arbitration" if it arose more than six years before the claim is filed. J.A. 48 (emphasis added). This specific provision excludes from the general scope of arbitration a particular class of disputes—namely, those of a particularly stale vintage—and this specific exclusion must be given effect. *See Mastrobuono*, 514 U.S. at 63 (holding that an arbitration agreement must be "read to give effect to all its provisions

and to render them consistent with each other"); *Department of Housing & Urban Dev. v. Rucker*, 122 S. Ct. 1230, 1233, 1235 (2002) (holding that statute was "unambiguous[]," in part because a "general statutory provision … cannot trump the clear language" of a "more specific" one).

Petitioner and the SEC nonetheless argue that the application of Section 10304 is not a matter of arbitrability because Section 10304 presents, in their view, a "procedural" rather than "subject matter" limitation. *See, e.g.*, Pet. Br. 23-24, 27; SEC Br. 13-14. As we explain below, this attempt to narrow dramatically the *AT&T/First Options* line of cases, and thus shrink significantly the sphere of judicially enforceable limits on arbitrability, does not withstand scrutiny. *All* restrictions on the scope of arbitration present threshold issues of "arbitrability." Once "arbitrability" is properly defined, the conclusion ineluctably follows that Section 10304 raises such an issue. The text, structure, and purpose of Section 10304 all confirm that it is and was intended to be a restriction on the scope of disputes that are subject to arbitration. This conclusion is buttressed by important policy considerations undergirding the FAA and the NASD arbitration scheme.

1. The concept of "arbitrability" encompasses all restrictions on the scope of arbitration.

a. "[A]rbitrability" refers simply to "whether [an] agreement creates a duty for the parties to arbitrate the particular grievance." *AT&T*, 475 U.S. at 649. This inquiry encompasses the questions "whether or not the [party] was bound to arbitrate, as well as what issues it must arbitrate." *Atkinson*, 370 U.S. at 241; *see also First Options*, 514 U.S. at 942 (question is "whether a party has agreed to arbitrate"); *John Wiley & Sons*, 376 U.S. at 546-47 (same); *Warrior & Gulf*, 363 U.S. at 582 (question is whether party agreed "to submit to arbitration [the] dispute"). Thus, the "arbitrability"

inquiry broadly entails consideration of *all* restrictions on the scope of arbitration under the parties' agreement.

b. The arguments of petitioner and the SEC, on the other hand, are premised on an artificially narrow concept of arbitrability that cannot be squared with this Court's precedents. In their view, the domain of arbitrability presumptively reserved for judicial resolution is confined to determining (i) whether the parties have entered into an arbitration agreement and, if so, (ii) whether the substance of a given dispute falls generally within the "subject matter" of that agreement. According to this approach, all other restrictions on or exclusions from the scope of arbitration are to be treated as procedural defenses reserved for decision by arbitrators. *See* Pet. Br. 19; *see also id.* at 23-25; SEC Br. 14, 16.

This cramped concept of arbitrability is off the mark. The Court has never suggested that arbitrability may be artificially confined to a mere "subject matter" determination. Nor does the dictionary definition of "arbitrable"—"subject to decision by arbitration"—draw any distinction based on the *reason* a dispute is subject to arbitration, be it the "subject matter" of the dispute or some other criterion. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (1976); *see also* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1997); THE COMPACT OED (2d ed. 1991); RANDOM HOUSE UNABRIDGED (2d ed. 1987). Simply put, arbitrability is not the limited term of art that petitioner and the SEC frame it to be.

A common-sense concept of arbitrability that reaches all restrictions on the scope of arbitration follows naturally from the fundamental principle underlying the FAA—that parties should be required to arbitrate a dispute if and only if they agreed to do so. Whether a particular restriction on arbitration is characterized as a "subject matter" limitation, a "procedural" limitation, or some other type of limitation is

entirely irrelevant to this bedrock principle. To ensure that parties agreed to arbitrate a dispute, the courts need to enforce *all* restrictions on the scope of the parties' arbitration agreement.

Petitioner's contrary definition of arbitrability is so contrived that she has difficulty precisely stating it. At times, petitioner and the SEC argue for a *per se* rule that time limits can never be "arbitrability" limits enforced by courts. *See, e.g.*, Pet. Br. 23-24; SEC Br. 7, 16. At other points, they recognize that the parties' intent is relevant, and suggest that their rule is only a presumption. *See, e.g.*, Pet. Br. 29; SEC Br. 17 n.5. They then go on, however, to suggest that their "presumption" is effectively unrebuttable. They accomplish this by essentially ignoring the language of Section 10304. *See, e.g.*, Pet. Br. 28-29; SEC Br. 25-26. Indeed, the SEC explicitly refuses to "treat[] a timeliness requirement as an issue of arbitrability merely because the timeliness requirement is phrased in certain language." SEC Br. 8. Petitioner likewise argues that her "subject matter"/procedure dichotomy controls "[n]otwithstanding" the text of Section 10304. Pet. Br. 7. In other words, the petitioner and the SEC admit that their position is not based on the parties' expressed intent. That position is fatally flawed, inasmuch as arbitration is "a matter of consent, not coercion." *Volt*, 489 U.S. at 479.[1]

Furthermore, petitioner's "subject matter" distinction rests on semantics. Petitioner appears to assume that the

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[1] Petitioner and the SEC attempt to downplay their anti-textualism by asserting that "[o]nce it is established that the arbitrators have jurisdiction of the subject matter, leaving issues such as timeliness to the arbitrators raises no cause for concern that arbitration is being imposed on a non-consenting party." Pet. Br. 24; *see also* SEC Br. 22. But this *ipse dixit* simply begs the question whether the parties consented to arbitrate certain (as here, stale) disputes. That question turns on the parties' expressed intent, which is embodied in Section 10304.

"subject matter" at issue here is the recommendation and sale of securities to petitioner by Dean Witter brokers. But the "subject matter" could be defined just as easily as the recommendation and sale of securities to petitioner by Dean Witter brokers within the past six years. At least one circuit has construed the "subject matter" of a dispute in precisely that way. *See General Drivers, Warehousemen & Helpers, Local Union 89 v. Moog Louisville Warehouse*, 852 F.2d 871, 874 (6th Cir. 1988) ("we construe the 'subject matter' of the dispute in the instant case to be whether or not the union filed a timely notice of arbitration"). Thus, petitioner's semantic exercise raises at least as many questions as it answers. This point is illustrated by *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775 (10th Cir. 1998), where the court of appeals engaged in an extensive analysis of the "subject matter" of an agreement, *see id.* at 782-84, and still ended up remanding for further fact-finding on whether the plaintiff's claims "relate[d] to the 'subject matter' of the [parties'] contract." *Id.* at 784. Although arising in a different context, *Riley* illuminates the inherent indeterminacy of petitioner's "subject matter" concept of arbitrability.

c. Petitioner's semantic distinction marks such a sharp break from this Court's jurisprudence that it is refuted by the very cases on which she relies. Petitioner points primarily to *John Wiley & Sons*, but the Court in *Wiley* held that it had "no doubt" that "a compulsory submission to arbitration cannot precede judicial determination that the [parties'] agreement does in fact create such a duty." 376 U.S. at 546-47. Petitioner quotes out of context a passage from *Wiley* in which the Court stated that "[o]nce it is determined ... that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.* at 557 (quoted in Pet. Br. 23-24). But *Wiley* held only that, *if* the parties have agreed to arbitrate a

dispute, genuinely procedural questions should be decided by the arbitrators as part of their arbitration proceedings. It never held that all issues other than "subject matter" are invariably "procedural" issues for arbitral resolution.

This point is confirmed by *Wiley*'s own treatment of a timeliness issue. After holding that courts must resolve "arbitrability" issues, *id.* at 546-47, the Court in *Wiley* considered whether petitioner's claims fell within the temporal scope of the parties' agreement. *See id.* at 554-55. The Court held that the dispute was arbitrable because "[c]laimed rights during the term of the agreement, at least, are unquestionably within the arbitration clause," and the Court did not read the plaintiff's arbitration request to assert other claims outside of that time frame. *Id.* In sum, the Court considered a timeliness issue as an "arbitrability" issue for judicial resolution pursuant to the parties' expressed intent; it did not use an artificial "subject matter"/procedure distinction to override that intent, as petitioner and the SEC urge here.

The SEC's reliance on *International Union of Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487 (1972), is equally misplaced. In that case, this Court stressed that "the scope of the arbitration clause ... remains a matter for judicial decision." *Id.* at 491. The Court then held that the defense of laches was "an arbitrable question under the [parties'] agreement" because the agreement "extends to 'any difference' between" the parties, and "[t]here is nothing to limit the sweep of this language or to except any dispute or class of disputes from arbitration." *Id.* at 491-92. In other words, this Court assumed that restrictions on the timeliness of disputes can present "arbitrability" issues for judicial resolution, but determined that the parties in that case had expressed an intent to arbitrate timeliness because (unlike here) they had not incorporated into their agreement a provision excluding untimely disputes from arbitration.

The SEC claims that *Flair Builders* did not present "a question of arbitrability" because "the Court did not require a 'clear' indication that the parties had … agreed" to submit the issue to arbitrators. SEC Br. 18-19. But that puts matters backwards. The "clear and unmistakable" presumption applies to whether the parties agreed to submit arbitrability to arbitrators, not to whether an issue is an arbitrability issue in the first place. *See, e.g., First Options*, 514 U.S. at 944-45. Indeed, the key point about *Flair Builders* is that the Court followed the plain meaning of the parties' arbitration agreement without applying any special presumptions with respect to timeliness issues. *Flair Builders* therefore refutes the SEC's argument that restrictions on timeliness can never be considered arbitrability issues, regardless of the parties' expressed intent.

This point is confirmed by *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). The question in *Mastrobuono* was whether arbitrators could award punitive damages. Under the test proposed by petitioner and the SEC, that question would always be resolved by arbitrators, not courts, because the availability of punitive damages is not a "subject matter" issue. But far from relying on such a test, this Court held that "the case before us comes down to what *the contract* has to say about the *arbitrability* of petitioners' claim for punitive damages." 514 U.S. at 58 (emphasis added). "[I]f the contract says 'no punitive damages,' that is the end of the matter, for courts are bound to interpret contracts in accordance with the expressed intentions of the parties—even if the effect of those intentions is to limit arbitration." *Id.* at 56-57. So too here, Section 10304 states that "[n]o" dispute more than six years old is "eligible for submission to arbitration," J.A. 48, and under *Mastrobuono*, "that is the end of the matter." 514 U.S. at 57.

Instead of acknowledging *Mastrobuono's* holding, petitioner relies on a footnote from *Mastrobuono* quoting

Moses H. Cone for the proposition that "'doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of *waiver, delay, or a like defense to arbitrability.*'" 514 U.S. at 62 n.8 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* 460 U.S. 1, 24-25 (1983)) (emphasis added); Pet. Br. 26. This footnote only confirms, however, that non-"subject matter" limitations, including timeliness limitations, are *not* governed by a special standard. Instead, they *can* be "defense[s] to arbitrability," depending on the parties' intent. *Id.* Whether or not that intent is subject to the normal presumption in favor of arbitrability is beside the point, because the text, structure, and purpose of Section 10304 easily overcome any such presumption, as we explain below. The key point is that petitioner's attempt to manufacture some *heightened* presumption with respect to timeliness and other non-"subject matter" issues runs contrary to this Court's jurisprudence, including the very cases on which petitioner and the SEC rely.

2. Text, structure and purpose all confirm that Section 10304 is a restriction on arbitrability.

Once the legal concept of arbitrability is put on proper footing under this Court's precedents, it becomes abundantly clear that the question whether petitioner's claim is time-barred under Section 10304 is an issue of arbitrability. The text, structure, and purpose of Section 10304 all confirm this.

a. A straightforward reading of the text establishes that Section 10304 entirely excludes a class of disputes from the scope of arbitration and is therefore a restriction on arbitrability. Section 10304 states that claims more than six years old are not "eligible for submission to arbitration." J.A. 48. The plain meaning of not "eligible for submission to arbitration" is that a dispute should not be considered by arbitrators. As now-Chief Judge Becker explained in

construing the New York Stock Exchange's identical Rule 603:

> "Eligible" is defined as "fitted or qualified to be chosen or used" or "worthy to be chosen or selected." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 736 (1966). "Submission" is defined as the act of "commit[ting something] for consideration, study, or decision." *Id.* at 2277. Interpolating these definitions into the text of Rule 603, the relevant portion of the rule would state that, after six years, *a dispute "shall [not] be worthy to be chosen or selected for [the] consideration, study, or decision [of] arbitration."* We think this expanded reading of Rule 603 unambiguously supports ... the district court's conclusion that the parties intended to bar from arbitration disputes raised more than six years after the events giving rise to them.

PaineWebber Inc. v. Hartmann, 921 F.2d 507, 513 (3d Cir. 1990) (emphasis added).

As Judge Becker's textual analysis demonstrates, Section 10304's use of the term "submission" should be dispositive. The prohibition against "submission" of time-barred disputes to arbitrators means that such disputes cannot be "commit[ted]" to the jurisdiction of arbitrators for "consideration, study, or decision" by them. *Id.* Thus, absent clearly expressed intent to the contrary, arbitrators have no power to decide any aspect of a dispute barred by Section 10304. Such a dispute is simply not "eligible for submission to arbitration."

In the context of defining the jurisdiction of arbitrators and the scope of arbitrability, Congress, this Court and the NASD have all recognized and applied this same common-

sense understanding of the key term "submission." Congress employed the term "submitted" in the FAA to describe the boundaries of arbitral jurisdiction. *See* 9 U.S.C. § 11 (court may modify award if "the arbitrators have awarded upon a matter not submitted to them"). This Court's arbitrability cases have likewise used the term "submit" or "submission" in describing whether parties agreed to arbitrate a dispute. *See, e.g., First Options*, 514 U.S. at 945 ("a party can be forced to arbitrate only those issues it specifically has agreed to *submit* to arbitration") (emphasis added); *AT&T*, 475 U.S. at 648-49 ("arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to *submit* such grievances to arbitration") (emphasis added); *John Wiley & Sons*, 376 U.S. at 547 ("compulsory *submission* to arbitration cannot precede judicial determination that the [parties' agreement] does in fact create such a duty") (emphasis added); *Atkinson*, 370 U.S. at 243 (holding that the parties' agreement did not provide for "the *submission* of grievances" to arbitration) (emphasis added); *Warrior & Gulf*, 363 U.S. at 582 ("a party cannot be required to *submit* to arbitration any dispute which he has not agreed so to submit") (emphasis added).

Other provisions of the NASD Code likewise employ variants on the phrase "eligible for submission" to describe the arbitrators' subject matter and personal jurisdiction. *See, e.g.*, NASD Code § 10101 ("Matters Eligible for Submission" include disputes regarding specified subject matters between specified types of persons); § 10336(a) (imposing amount-in-controversy limitation for claims "eligible to be heard by a single arbitrator"). Indeed, the Code expressly equates "eligibility" with "arbitrability" by providing that "a dispute, claim, or controversy eligible for submission ... shall be arbitrated ...." NASD Code § 10201(a); *see also* § 10301(a) (same). This consistency of usage further confirms the natural meaning of the pivotal terms at issue.

The language of the NASD Code, grounded in the terminology of the FAA and this Court's jurisprudence, is further illuminated by petitioner's own actions. Specifically, petitioner attempted to commence arbitration by filing a "SUBMISSION AGREEMENT" stating that she "submit[ted] the present matter in controversy ... to arbitration." J.A. 24. That is precisely what she was not permitted to do, inasmuch as Section 10304 renders this case "[in]eligible for *submission* to arbitration." J.A. 48 (emphasis added). Petitioner now finds herself arguing, oddly, that she is free to "submit[]" to arbitration a dispute that is ineligible for "submission to arbitration."

b. Section 10304's plain meaning is confirmed by its structure. After providing that claims more than six years old are not "eligible for submission to arbitration," Section 10304 goes on to specify that the six-year exclusion does not operate to "extend applicable statutes of limitations." J.A. 48. The section by its own terms thereby confirms that the six-year time bar is *not* the same as an "applicable statute[] of limitations." *Id.* Instead, limitations periods are drawn from state or federal law and are in no wise superseded or affected by Section 10304. This structural point refutes petitioner's assertion that Section 10304 should be treated as "a defense [to a claim] similar to statutes of limitation or repose," instead of as a threshold restriction on arbitral jurisdiction. Pet. Br. 7.

Section 10304 concludes by stating that it does not "apply to any case which is directed to arbitration by a court of competent jurisdiction." J.A. 48. This further confirms that Section 10304 is not merely a statute of limitations defense to be raised during an arbitration. If it were, there would be no reason to make it inapplicable to cases directed to arbitration by courts. It is precisely because Section 10304 is a limit on arbitrability itself that it was necessary for the NASD to specify that arbitrators should not apply the

section once a court has determined a dispute to be arbitrable.

c. If there were any lingering doubt whether Section 10304 is a restriction on arbitrability, it would be dispelled by the purposes underlying that section. Contrary to petitioner's suggestion, Section 10304 was not designed to provide a supplemental statute of limitations. As petitioner concedes, six years is longer than most, if not all, statutes of limitations that might apply to disputes under the parties' agreement. *See* Pet. Br. 15; *Ohio Co. v. Nemecek*, 98 F.3d 234, 236-37 (6th Cir. 1996).[2] If Section 10304 were intended to establish a new, private statute of limitations to supersede any other applicable statute of limitations that might exceed six years, then the SEC presumably would have disapproved the rule or subsequently invalidated it. *Cf. Shearson Am. Express, Inc. v. McMahon*, 482 U.S. 220, 233-34 (1987) (describing the SEC's "broad authority to oversee and regulate the rules" of the NASD). Far from doing so, the SEC has recognized that Section 10304 differs from a statute of limitations in that "a claim can be barred by a statute of limitations and yet satisfy the time limit imposed by the rule, or vice versa," and that while "a statute of limitations affects a party's right to recover in any forum ... Rule 10304 provides only that certain claims are not eligible for arbitration under the NASD Code." SEC Br. 26 (internal quotation and brackets omitted).

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[2]The limitations period for most securities claims is three years or less. *See* 67 Fed. Reg. 19,464, 19,466 & n.15 (Apr. 19, 2002). Under New York law, six years exceeds even the limitations period for intentional torts, *see* N.Y. C.P.L.R. § 215 (one year), and for all but the most serious felonies, *see* N.Y. Crim. Pro. § 30.10(2)(b) (five years). It is also equal to the residual limitations period for cases to which no specific period applies. *See* N.Y. C.P.L.R. § 213. Simply put, the six-year limit is far too generous to reflect an intent to shorten the applicable limitations period.

These differences point to Section 10304's basic office to protect against the unfairness of submitting stale cases to arbitrators. While securities claims are generally well-suited to arbitration, old ones are not. As the NASD has explained, "the securities industry believed that the inherently equitable nature of arbitration posed a greater risk that arbitrators might not strictly apply legal defenses such as statutes of limitation." 63 Fed. Reg. 588, 589 (Jan. 6, 1998). Arbitrators' consideration of old claims could be fundamentally unfair to a firm that no longer had access to the materials it needed to defend itself—because documents are generally destroyed after six years pursuant to the SEC's document-retention rules; because the increasing mobility of brokers within the industry means that brokers often leave their firms within six years; and because of all the more general reasons that statutes of limitations exist. *See id.* at 589, 591 (citing SEC Rule 17a-4, 17 C.F.R. § 240.17a-4). In addition, securities firms have long understood that "uncertainty about arbitrator application of statutes of limitation makes analyzing the risks of litigating a claim much more difficult and makes decisions about disposing of records much riskier." *Id.* at 591. Significantly, these concerns reflect the unfairness inherent in submitting long-stale cases *to arbitrators*, rather than to courts. *See* Br. for the Securities Industry Ass'n as *Amicus Curiae* at 12-13, 16-18.

Not surprisingly, therefore, the SEC ultimately concedes that Section 10304 "reflect[s] a judgment that claims that were more than six years old could be unsuitable *for arbitration*." SEC Br. 24 (emphasis added). Petitioner likewise recognizes that the rule was designed "to prevent stale claims *from going to arbitration*." Pet. Br. 15 (emphasis added). Section 10304's purpose to prevent *arbitrators* from considering stale claims can be effectuated *only* by interpreting it, according to its plain terms, to be a judicially enforceable restriction on arbitrability.

For that reason, the NASD has explained that the rule is a "substantive jurisdictional time limitation on the dispute[s] that could be arbitrated." 63 Fed. Reg. at 592. Although the SEC opines that this statement is "unclear," SEC Br. 24 n.8, it could scarcely be clearer: the NASD said that the rule is a "jurisdictional" limit on the disputes that can be "arbitrated." 63 Fed. Reg. at 592. Thus, the NASD has confirmed that, unless the parties agreed otherwise, *"the courts* determine the scope of the agreement to arbitrate, *including whether a matter is eligible for arbitration on subject matter, timeliness, or other grounds*." 59 Fed. Reg. 39,373, 39,374 (Aug. 2, 1994) (citing *AT&T*, 475 U.S. at 649) (emphasis added);[3] *see also* 63 Fed. Reg. at 594 (stressing "the difference between eligibility and statutes of limitation, a distinction that has occasionally been overlooked by courts, arbitrators, and other participants"). While these explanatory statements could not alter the plain language of Section 10304, they strongly confirm that the section means what it says. Disputes more than six years old are simply not "eligible for submission to arbitration."

d. Significantly, petitioner and the SEC have little to say with respect to these interpretive points. They seek refuge in the general presumption that "'doubts concerning the scope

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[3] Petitioner and the SEC ignore this clear statement and instead rely on the NASD's separate statement that, on its face, "'Section [10304] does not specify who has the authority to determine if a claim is eligible for submission to arbitration.'" Pet. Br. 28 (quoting 59 Fed. Reg. at 39,373-74); SEC Br. 24 n.8. That statement is irrelevant to the question whether Section 10304 governs arbitrability or instead provides a statute-of-limitations defense. Instead, it speaks to the distinct question who decides arbitrability issues under Section 10304. On that question, the NASD's statement is of no benefit to petitioner because silence on the question who decides arbitrability cannot overcome the presumption that courts decide such issues. *See, e.g., First Options*, 514 U.S. at 944. That is precisely why the NASD recognized that, under the current version of its rules, courts are to apply the time-bar absent a contrary agreement by the parties. *See* 59 Fed. Reg. at 39,374.

of arbitrable issues should be resolved in favor of arbitration.'" Pet. Br. 26 (quoting *Mastrobuono*, 514 U.S. at 62 n.8). But they cannot point to anything in the text, structure or purpose of Section 10304 that creates *any* doubt that "eligible for submission to arbitration" means anything other than what it says. As this Court very recently stressed, courts cannot "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *EEOC v. Waffle House*, 122 S. Ct. 754, 764 (2002); *see also id.* at 762; *Volt*, 489 U.S. at 476; *Hartmann*, 921 F.2d at 513 ("a compelling case for nonarbitrability should not be trumped by a flicker of interpretive doubt").

Far from discerning a genuine ambiguity in Section 10304, petitioner claims only that ineligible for "submission to arbitration" could mean ineligible for "'submission for full adjudication of the merits, rather than submission for preliminary determinations.'" Pet. Br. 28 (quoting *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 600 (1st Cir. 1996)). That reading makes little sense. If a case is ineligible for full submission on the merits, it is by definition ineligible for submission on preliminary issues such as arbitrability. There would be no reason for an arbitrator to decide "preliminary" issues if the arbitration could not go forward on the merits.

The SEC does not even mount a textual argument. Instead, it anti-textually asserts that "Rule 10304 could easily have been phrased" differently. SEC Br. 25; *see also id.* at 26. That merely says that the parties could have expressed a different intent than they did. The SEC also argues that the courts of appeals are in near-unanimous agreement that statutes of limitations—as opposed to limits on eligibility for submission to arbitration—should be decided by arbitrators. *See* SEC Br. 23. But by resting its position on cases addressing differently worded provisions with different purposes, while refusing to consider the text of Section 10304, the SEC essentially assumes its own conclusion.

Simply put, no one has identified a plausible textual basis, or any other persuasive ground, for holding that Section 10304 is anything other than a jurisdictional bar.[4] As the court of appeals correctly held, Section 10304 "can reasonably be read in only one way—as a substantive limit on the claims that the parties have contracted to submit to arbitration." Pet. App. 18a (internal quotations omitted).[5]

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[4] Of the eight courts of appeals that have considered this issue, five, including the Tenth Circuit, have so held. *See* Pet. App. 18a; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381, 384 (11th Cir. 1995); *PaineWebber Inc. v. Hofmann*, 984 F.2d 1372, 1378-79 (3d Cir. 1993); *Roney & Co. v. Kassab*, 981 F.2d 894, 898 (6th Cir. 1992); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 512-13 (7th Cir. 1992). Of the other three courts of appeals, two did not consider Section 10304's text; they simply held that all time limits are presumptively defenses for arbitrators to apply. *See Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 754 (5th Cir. 1995); *O'Neel v. NASD*, 667 F.2d 804, 807 (9th Cir. 1982). The remaining court relied on a similar presumption, the particularly weak and unpersuasive textual analysis discussed on page 26 above, and a handful of other considerations. *See Elahi*, 87 F.3d at 600.

[5] If petitioner were correct that this case must be resolved based on her proposed "subject matter"/procedure dichotomy, this case would still present an arbitrability issue for the courts. Although Section 10304 does not fall neatly into either of petitioner's two categories, it is far more like a "subject matter" limitation than a procedural one. It is not designed to govern the conduct of proceedings before arbitrators, but instead is designed to determine which cases should be decided by arbitrators in the first instance. This is confirmed by the SEC's reliance on statute-of-limitations cases, *see, e.g.*, SEC Br. 23, because in other contexts where a distinction between "substance" and "procedure" does matter, the courts have held that while statutes of limitations are "procedural," statutes of repose are "substantive." *See, e.g., First United Methodist Church of Hyattsville v. United States Gypsum Co.*, 882 F.2d 862, 865-66 (4th Cir. 1989). Section 10304 is far more analogous to a statute of repose than a statute of limitations because it imposes an absolute time bar that is not subject to tolling. *See, e.g., Prudential Secs., Inc. v. Yingling*, 226 F.3d 668, 672 n.4 (6th Cir. 2000); *Cohen*, 62 F.3d at 385 n.4 (citing cases); *see generally Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391-92 (7th

3. Policy considerations confirm that Section 10304 is a restriction on arbitrability.

Petitioner urges the Court to depart from both well-established precedent and the language and intent of Section 10304 on the basis of ill-conceived policy arguments this Court has repeatedly rejected. By denigrating the parties' expressed intent, petitioner would jeopardize the rights of all parties to arbitration agreements, particularly (and ironically) consumers. Although petitioner expresses concern that a threshold judicial determination could delay commencement of the arbitration process, it is in fact petitioner's approach that would, in the end, lead to additional delay and expense. As a result, her position is contrary to the policy concerns animating the FAA and this Court's arbitration jurisprudence.

a. Petitioner's artificial presumption that all non-"subject matter" limitations on disputes are for arbitrators to apply is flatly inconsistent with the FAA's focus on effectuating the parties' intent. Parties can rationally decide to limit the claims or issues they wish to arbitrate in any number of ways. These limits can include the "subject matter" of the dispute (whatever that may mean), but as now-Chief Judge Becker explained, they can also include other types of restrictions:

> It is ... not hard to conceive of agreements containing economic limitations (*e.g.*, only disputes involving less than $10,000) or geographic limitations (*e.g.*, only disputes arising in Pennsylvania) on the parties' obligation to arbitrate. Similarly, as numerous courts have recognized, parties to an arbitration agreement might substantively limit their obligation to arbitrate in a *temporal* sense.

Cir. 1990) (Easterbrook, J.) (discussing the differences between statutes of limitations and repose in securities litigation).

Hartmann, 921 F.2d at 511 (emphasis in original). Parties can also decide that courts should determine certain issues, such as whether punitive damages are available or whether a party waived the right to arbitrate. *See Mastrobuono*, 514 U.S. at 57-58 (determining the availability of punitive damages); *Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionary Workers Int'l, AFL-CIO*, 370 U.S. 254, 266-67 (1962) (determining whether party waived the right to arbitrate). Whether or not these are characterized as "subject matter" issues, they are contractual limits on agreements to arbitrate that should command judicial respect. They should not be disparaged through the imposition of heightened, non-intent-based presumptions. "To rule otherwise ... would thwart the intent of the parties' arbitration agreement." *Ohio Co. v. Nemecek*, 98 F.3d 234, 237 (6th Cir. 1996).

Departing from the parties' expressed intent in favor of artificial presumptions untethered to intent would disserve all parties to all arbitration agreements by depriving them of their right to contract. As *amici* the Trial Lawyers for Public Justice and AARP point out, any "unmooring [of] arbitration from its statutorily mandated basis in a valid contractual agreement" would be especially harmful to consumers. TLPJ & AARP Br. 4. Consumers are the least likely to know the intricacies of arbitration law, and therefore the most likely to rely on the plain language of their agreements. *Cf.* 63 Fed. Reg. at 592 ("plain English rules are particularly important" for "*pro se* parties"). Thus, if courts erect presumptions based on purported policy concerns instead of the parties' intent, it will be increasingly difficult for consumers to discern the import of what they are signing, and increasingly unlikely that arbitration will be consensual.

In many cases, including this Court's decision in *First Options*, it has been individuals or their protectors, not

businesses, that have resisted arbitration. *See, e.g., EEOC v. Waffle House*, 122 S. Ct. 754, 758 (2002) (EEOC); *First Options*, 514 U.S. at 940-41 (investors); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268-69 (1995) (homeowners). That is presumably the reason why *no* plaintiff groups support petitioner's effort to curtail judicial enforcement of contractual limits on arbitration agreements. Judicial oversight protects *everyone*.

b. While petitioner and the SEC claim that judicial enforcement would thwart the policies behind the FAA by slowing down the dispute resolution process, that contention is both irrelevant and incorrect. It is irrelevant because this Court has repeatedly held that "federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone*, 460 U.S. at 20 (emphasis in original); *accord First Options*, 514 U.S. at 946-47; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-21 (1985). As the Court explained in *First Options*, "the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms." 514 U.S. at 947 (internal citations and quotations omitted). Thus, even petitioner has to concede that "the primary goal of the FAA was to enforce private agreements to arbitrate and ... *this goal takes precedence over the secondary goal of encouraging efficient and speedy dispute resolution.*" Pet. Br. 12 (discussing *Byrd*) (emphasis added).

Moreover, the most likely source of delay in this context is arbitral, not judicial, resolution of the six-year time bar. Judicial resolution of this dispute should be straightforward because Section 10304 provides a bright-line rule whose application requires only a measuring tape. *See, e.g., Prudential Secs., Inc. v. Yingling*, 226 F.3d 668, 672 n.4 (6th Cir. 2000); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 513 (7th Cir. 1992). The SEC attempts to complicate

this issue by insisting that "[t]o the extent petitioner claims that respondent made misrepresentations within six years prior to the date that she requested arbitration and that those misrepresentations caused her to retain the investments, then that claim would be timely." SEC Br. 21. The short answer is that petitioner's claim is based solely on the recommendation and sale of investments to her in 1986.[6]

More fundamentally, application of Section 10304 requires only that a district court read a plaintiff's statement of claim, identify the transactions and occurrences that underlie that claim (whether meritorious or not), and determine whether those transactions or occurrences took place more than six years before the plaintiff filed the claim. That is the holding of the very cases cited by the SEC and petitioner on this point. *See* SEC Br. 21 (citing *Cohen*, 62 F.3d at 385; *Hoffman*, 984 F.2d at 1381); Pet. Br. 24-25. Reviewing a statement of claim in this manner is not a time-consuming or expensive proposition; it certainly does not require a "mini-trial," as the SEC and petitioner would have it. SEC Br. 21; *see also* Pet. Br. 24.

c. In contrast to the minimal delay occasioned by judicial enforcement of Section 10304, extensive delay and wasteful proceedings frequently flow from arbitral resolution of eligibility issues. As the NASD has explained, arbitrators "tend to delay eligibility decisions until the hearing on the merits," and thereby subject the parties to unnecessary delay and cost by failing to provide the threshold determination that courts provide. *See* 63 Fed. Reg. at 589; *cf.* Charles N. Brower & Abby C. Smutny, *Arbitration Agreements Versus Forum Selection Clauses: Legal and Practical Considerations*, in INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION 37, 42 (Jack

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[6] Petitioner pleaded subsequent misrepresentations only in the context of alleging that statutes of limitations should be tolled—a point irrelevant to Section 10304's bright-line six-year rule. *See* J.A. 21.

Goldsmith ed., 1997) ("the amicable and flexible nature of arbitration may give rise to even greater time delays and consequent costs than litigation"). This tendency is exacerbated by the fact that NASD arbitrators are paid by the half-day, and therefore have a financial incentive to hear cases on their merits instead of, if warranted, dismissing them at the outset on jurisdictional grounds. *See* NASD Code §§ IM-10104, 10205(b).

The SEC only confirms the efficiency of threshold judicial resolution by stressing that courts could review arbitrators' rulings under Section 10304 *after* arbitration has concluded. *See* SEC Br. 10 n.4, 22; *see also Geneva Secs., Inc. v. Johnson*, 138 F.3d 688 (7th Cir. 1998) (invalidating arbitral award under Section 10304); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir. 1992) (same). It defies common sense to subject parties to the time and expense of full arbitration proceedings, and only then to determine whether those proceedings were valid.

d. Petitioner nonetheless suggests that this Court should deny judicial enforcement of Section 10304 in order to avoid opening the floodgates to judicial involvement in all sorts of minor procedural disputes. *See* Pet. Br. 27. This is misguided. There is no reason to believe that parties would agree to judicial involvement in genuinely minor matters, since such involvement would deprive the parties of some of the benefits of arbitration (expedition and reduced cost). The parties thus have an incentive to provide for judicial involvement only when such involvement makes sense.

e. Ironically, it is petitioner's artificial "subject matter"/procedure distinction, and non-intent-based presumption, that would impose the greater burden on the courts by depriving them of clear rules to guide their decisions. The best and most practical way to reduce the burden on the judiciary, and the cost and delay to the parties, is to articulate clear rules that can produce predictable

results. In this context, that means reading arbitration agreements at face value. Doing so simplifies arbitrability determinations to the greatest extent possible, and thereby leads to quicker determinations and fewer conflicts in the lower courts. As this Court explained in *Allied-Bruce Terminix Cos. v. Dobson*, the creation of a "new, unfamiliar test" in this area would "unnecessarily complicat[e] the law, and breed[] litigation from a statute that seeks to avoid it." 513 U.S. 265, 275 (1995).

That is exactly what petitioner is seeking. Petitioner is proposing a presumption, not grounded in this Court's precedents, that all limitations on the "timeliness" of a particular dispute, no matter what their purpose or effect, are for arbitrators to decide. Pet. Br. 28. This proposed presumption would only breed litigation by raising more questions than it answers, since the lower courts would inevitably struggle to determine when and how the facts of a particular case suffice to overcome this presumption. The general *Moses H. Cone* presumption in favor of arbitrability is easy to administer because it looks to whether the parties expressed their intent unambiguously—a familiar standard that courts administer in other contexts involving contract and statutory interpretation. But because petitioner's alternative presumption disregards the wording and import of the particular timeliness restriction at issue, it is unmoored from the best evidence of the parties' intent, and therefore more difficult to apply.

C. The parties did not clearly and unmistakably agree to arbitrate arbitrability.

Notwithstanding the importance of judicial enforcement of Section 10304, petitioner and the SEC argue that the parties agreed to let arbitrators determine their own jurisdiction under that section. Not so. There is a strong presumption that parties do not agree to arbitrate arbitrability precisely because it is unlikely that anyone would do so. *See*

pages 10-12, above. As explained above, this presumption promotes arbitration by making parties more willing to enter into arbitration agreements in the first place. *See id.* Accordingly, this Court has stressed that "silence or ambiguity" on the question who should determine arbitrability is insufficient to deprive parties of judicial protection. *First Options*, 514 U.S. at 944. Only "'clea[r] and unmistakabl[e]' evidence" of an intent to arbitrate arbitrability will overcome the presumption that courts must resolve such issues. *Id.* (quoting *AT&T*, 475 U.S. at 649).[7]

Six of the eight courts of appeals to address this point have concluded that similarly situated parties did not clearly and unmistakably agree to arbitral resolution of eligibility issues. *See, e.g.*, Pet. App. 24a-25a (not clear and unmistakable); *Miller v. Flume*, 139 F.3d 1130, 1134 (7th Cir. 1998) (same); *Smith Barney, Inc. v. Sarver*, 108 F.3d 92, 96-97 (6th Cir. 1997) (same); *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 595 (1st Cir. 1996) (same); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381, 384 (11th Cir. 1995) (same); *PaineWebber Inc. v. Hoffman*, 984 F.2d 1372, 1379 n.4 (3d Cir. 1993) (same); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996) (clear and unmistakable); *FSC Sec. Corp. v. Freel*, 14 F.3d 1310, 1312-13 (8th Cir. 1994) (same).

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[7] This presumption serves not only to effectuate the parties' presumed intent, but also to protect their due process right to an impartial decision-maker. Because NASD arbitrators are paid by the half-day, they have a financial incentive to find in favor of their own jurisdiction. *See* NASD Code §§ IM-10104, 10205(b). Requiring parties, against their will, to submit arbitrability disputes to a self-interested decision-maker would violate the Due Process Clause. *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Thus, before requiring parties to submit issues of arbitrability to arbitrators, it is especially important to confirm that the parties clearly and voluntarily agreed to submit such issues to arbitral resolution.

Petitioner wants to believe that all six of these courts of appeals were mistaken about some "unmistakable" evidence of intent. They were not. The parties here expressed an intent *not* to arbitrate arbitrability by adopting provisions of the NASD Code that contemplate judicial resolution of eligibility issues. None of the language cited by petitioner or the SEC is to the contrary. Petitioner cannot escape this conclusion by resort to state law.

1. The parties agreed that courts would apply Section 10304.

The NASD Code confirms that eligibility issues should be decided by courts, not arbitrators. Section 10304 specifies that petitioner's entire "dispute, claim, or controversy"—not only her "claim"—is ineligible for submission to arbitration. J.A. 48. By precluding arbitral resolution of the overall "dispute," Section 10304 precludes arbitrators from deciding *any* issues in this case, including the threshold question whether this case is arbitrable. A narrower interpretation of Section 10304 would read the terms "dispute" and "controversy" right out of the section.

This point is confirmed by additional provisions of the Code. Section 10104 states that the NASD Director of Arbitration "shall compose and appoint panels of arbitrators ... to conduct the arbitration of any matter which shall be eligible for submission under this Code." NASD Code § 10104. By providing that arbitrators should be appointed for matters that are "eligible for submission," this section contemplates that eligibility is determined *before* arbitrators are appointed, not by the arbitrators themselves. Otherwise, arbitrators would be appointed whether or not a dispute is "eligible for submission," in contravention of Section 10104. When the NASD wished to make a limited exception to this rule, it did so expressly. *See* NASD Code § 10301 (granting arbitrators authority to determine whether certain class action-type claims are eligible for submission); *cf.* NASD

Code § 10402 (granting the Director "sole authority" to determine whether matters are eligible for submission to *mediation*). Here, it did not.

2. NASD Code Section 10324 does not clearly and unmistakably evidence an intent to arbitrate arbitrability.

Petitioner and the SEC ignore these portions of the NASD Code and instead rely on a separate provision, Section 10324, which states that "[t]he arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s)." *See* Pet. Br. 33-35; SEC Br. 28-29. This section states only that arbitrators *may* interpret all provisions of the NASD Code when called upon to do so; not that they have *exclusive* authority to do so in lieu of judicial enforcement of Section 10304.[8] Thus, Section 10324 says "nothing specific about whether the arbitrator or the court should decide whether a claim is arbitrable," and instead leaves that decision to the parties. *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474, 480 (10th Cir. 1996) (emphasis added). If the parties clearly and unmistakably agree to let arbitrators apply the eligibility bar of Section 10304, arbitrators can do so under Section 10324. But absent such an agreement, questions arising under the time bar of Section 10304, like all arbitrability questions, are resolved by courts.

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[8] Arbitrators could not possibly have exclusive jurisdiction to apply all sections of the NASD Code, inasmuch as many of those sections, like Section 10304, indicate that they are to be applied or enforced at least in part by someone other than an arbitration panel. *See, e.g.*, NASD Code § 10103 (appointment of Director of Arbitration); § 10104 (appointment of arbitration panels); § IM-10404 (arbitrators' honoraria); § 10202 (composition of arbitration panels); § 10211 (minimum qualifications for arbitrators); § 10312 (disclosures required of arbitrators).

The last sentence of Section 10304 confirms this point by providing that Section 10304's time bar does not "apply to any case which is directed to arbitration by a court of competent jurisdiction." J.A. 48. This provision reflects the NASD's intent that courts will generally apply the time bar, and arbitrators will not second-guess the courts by applying it again. Thus, when read together, Sections 10304 and 10324 contemplate that courts will enforce Section 10304 unless the parties have clearly and unmistakably agreed otherwise. The NASD itself has interpreted the current version of its rules in this manner. *See* 59 Fed. Reg. at 39,374 ("*[u]nless the parties agreed otherwise*, the courts determine the scope of the agreement to arbitrate, including whether a matter is eligible for arbitration on subject matter, timeliness, or other grounds") (emphasis in original).

As the Tenth Circuit recognized, a broader reading of Section 10324 would violate "the generally applicable rules governing contract interpretation that specific provisions [like Section 10304] take precedence over more general provisions [like Section 10324]." *Cogswell*, 78 F.3d at 480; *see generally* RESTATEMENT (SECOND) CONTRACTS § 203 cmt. e (1979); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957). At an absolute minimum, the general and permissive language of Section 10324 does not "clearly and unmistakably" require a contrary conclusion. *See Humphrey v. Moore*, 375 U.S. 335, 345 n.8 (1964) (determining that it was "by no means clear" that a general grant of authority to interpret a contract permitted a joint conference committee to interpret specific limitations on its own authority under that contract).

All but two courts of appeals have agreed with the Tenth Circuit on this point. *See, e.g., Miller*, 139 F.3d at 1134; *Cohen*, 62 F.3d at 384; *Sarver*, 108 F.3d at 96. The two courts that held to the contrary rested their holdings on the observation that "[i]n no uncertain terms, [Section 10324] commits interpretation of *all* provisions of the NASD Code

to the arbitrators." *FSC Sec. Corp. v. Freel*, 14 F.3d 1310, 1313 (8th Cir. 1994) (emphasis added); *see also PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996) (following *Freel*). In addition to missing the point that Section 10324 is merely permissive and does not confer *exclusive* powers on arbitrators, these courts erred by focusing on Section 10324's *breadth* rather than its lack of *specificity*. As explained above, Section 10324 says nothing specific on the question who should determine eligibility for arbitration.

This latter point is critical because the "clear and unmistakable" test was designed to protect parties that had "not focus[ed] ... upon the significance of having arbitrators decide the scope of their own powers." *First Options*, 514 U.S. at 945. Given that "broad but nonspecific language" does not demonstrate that the parties actually focused on a specific question, it is not "clear and unmistakable." *Brown v. ABF Freight Sys., Inc.*, 183 F.3d 319, 322 (4th Cir. 1999) (Luttig, J.) (applying a similar "clear and unmistakable" rule to an arbitration agreement) (internal quotation and citation omitted); *cf. Gonzaga Univ. v. Doe*, 122 S. Ct. 2268, 2280 (2002) (Breyer, J., concurring) ("broad and nonspecific" language creates uncertainty, not clarity). For precisely this reason, this Court has repeatedly held that broad words like "any" and "all" do not express a clear and unmistakable intent sufficient to overcome similar plain statement rules. *See, e.g., Raygor v. Regents of Univ. of Minn.*, 122 S. Ct. 999, 1004-06 (2002) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)); *Blatchford v. Native Village of Noatak & Circle Village*, 501 U.S. 775, 786 & n.4 (1991); *cf. Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 357-58 (1956) (agreement to "refrain from engaging in any strike" did not support "all-inclusive interpretation"). So, too, here, Section 10324's use of the broad term "all" cannot make up for its lack of specificity regarding the question at hand,

especially when read in conjunction with Section 10304, which contemplates *judicial* resolution of eligibility issues.

3. The parties' 1992 agreement does not clearly and unmistakably evidence an intent to arbitrate arbitrability.

Besides relying on Section 10324, petitioner claims that the parties' 1992 agreement clearly and unmistakably commits the parties to arbitrate all arbitrability issues. Even the SEC does not go so far. Instead, the SEC argues that the 1992 agreement could be read to support arbitral resolution of arbitrability issues *if* this Court ignored the *AT&T/First Options* presumption, and instead applied the exact opposite presumption that "parties to a valid arbitration agreement intend the arbitrators to decide disputed issues." SEC Br. 27. Because the SEC is applying the wrong presumption, its analysis of the 1992 agreement is irrelevant. If anything, it shows that the agreement does not "clearly and unmistakably" require the parties to arbitrate arbitrability.

For her part, petitioner argues that because the parties' arbitration agreement generally provides for arbitration of "all controversies" on specified subjects, it manifests a clear and unmistakable intent to arbitrate arbitrability. *See* Pet. Br. 30, 39 (citing J.A. 6-7). Petitioner is mistaken. This clause states only that certain types of controversies should be arbitrated; it does not specify who should determine whether this is one of those types of controversies. In other words, the parties' arbitration clause identifies the *scope* of their arbitration obligations, but does not specify who should decide which cases fall within that scope, *i.e.*, which cases are arbitrable. That task falls to the courts. *Cf. AT&T*, 475 U.S. at 644-45 (holding that arbitration clause providing that "differences arising with respect to the interpretation of this contract ... must be referred to a mutually agreeable arbitrator" was not clear and unmistakable) (internal quotation omitted).

Petitioner attempts to overcome this by stating that "[t]he word 'all'" is "as *broad*[] as possible." Pet. Br. at 39 (emphasis added). But once again, this misses the mark. As explained above, "broad but nonspecific" words like "all" cannot overcome the plain statement rule because they show only that the parties used broad words; not that they had a specific intent on the specific question whether to submit arbitrability to arbitrators. *See Brown*, 183 F.3d at 322; page 38, above. Petitioner all but admits this by claiming that "inasmuch as agreements to arbitrate are generously construed," "[t]he phrase 'all controversies' *presumably* includes" arbitrability disputes. Pet. Br. 39 (emphasis added; internal quotation omitted). Because, however, the question here is whether the parties expressed a clear and unmistakable intent to consign the specific issue of arbitrability to arbitrators, petitioner's advocacy of generous construction and presumption shows only that the parties did *not* manifest such an intent.

Petitioner also relies briefly on the "Arbitration Disclosures" of the parties' agreement. *See* Pet. Br. 40. Those disclosures explain to the customer that "[a]rbitration is final and binding on the parties," "[t]he parties are waiving their right to seek remedies in court, including the right to jury trial," and "[p]re-arbitration discovery is generally more limited than and different from court proceedings." J.A. 6. Far from addressing the question at hand, these disclosures only describe the broad confines of what arbitration entails to the layperson. While petitioner seizes on the statement that "the parties [are] waiv[ing] their right to seek remedies in court, including the right to jury trial," the Tenth Circuit correctly concluded that nothing in that sentence specifically addresses the question who decides whether a specific dispute is arbitrable. *See* Pet. App. 27 (internal quotation omitted). Waiver of the right to jury trial in an arbitrable case, on the one hand, and waiver of the right to judicial determination of whether a dispute is arbitrable, on the other

hand, are entirely different matters. Moreover, a broad reading of the provision "would essentially nullify Howsam's arbitration rights entirely" because it would "mean that Howsam had waived any ability to seek an order compelling arbitration, or to seek judicial enforcement of an arbitration award." *Id.* at 27-28 (internal quotation omitted). That is an unreasonable construction of the contract, not a "clear and unmistakable" one.

Accordingly, petitioner is in the curious position of arguing that the agreement is "clear and unmistakable" based on the canon of construction that "'a court should construe *ambiguous* language against the interest of the party who drafted it.'" Pet. Br. 36 (quoting *Mastrobuono*, 514 U.S. at 62) (emphasis added). Of course, this canon is inapplicable in this context. It applies only when an agreement is ambiguous, but if the parties' agreement is ambiguous on the question who decides arbitrability, *AT&T Technologies* and *First Options* require that it be construed in favor of judicial resolution.[9]

Petitioner's reliance on *Mastrobuono* is likewise misplaced, because the question there was whether certain claims were arbitrable, *not* who should decide arbitrability issues. As a result, the *AT&T/First Options* presumption did not apply in *Mastrobuono*. Because the presumption does apply in the present case, it trumps any and all contrary common-law canons of construction. *See First Options*, 514 U.S. at 944 (explaining that the "clear and unmistakable"

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[9] Petitioner's canon is inapplicable even on its own terms because Dean Witter is not the drafter of the relevant provisions. As the SEC acknowledges, Dean Witter is required by federal law to be a member of the NASD; is required by the NASD to agree to arbitration under the NASD Code (which is drafted by the NASD and approved by the SEC); and is required by the NASD not to modify the core language of its customer service agreement. *See* SEC Br. 9 n.3. Accordingly, petitioner errs in arguing that Dean Witter should be held responsible for deliberately drafting a vague agreement. *See* Pet. Br. 35-36.

presumption is an "important qualification" to the general rule that courts "apply ordinary state-law principles that govern the formation of contracts"). Even when plain-statement rules are not at issue, the canon construing ambiguous language against the drafter is "used only as a matter of last resort after all [other] aids to construction have been employed." *United States Fire Ins. Co. v. General Reinsurance Corp.*, 949 F.2d 569, 573 (2d Cir. 1991); *accord Mesa Air Group, Inc. v. Department of Transp.*, 87 F.3d 498, 506 (D.C. Cir. 1996). Petitioner's reliance on this inapplicable canon of last resort serves only to confirm that the 1992 agreement does not clearly and unmistakably support her position.

4. Petitioner's reliance on New York law is misplaced.

In a final effort to rebut the *AT&T/First Options* presumption, petitioner (but not the SEC) argues that this case is governed by New York rather than federal arbitration law. *See* Pet. Br. 40-43. This is incorrect. It is also irrelevant, because the New York case cited by petitioner purports to apply federal, not state, law.

As the Tenth Circuit held, this case is governed by the "'federal substantive law of arbitrability'" that the federal courts have derived under the FAA. Pet. App. 20a (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *see also Perry v. Thomas*, 482 U.S. 483, 489-91 (1987). While petitioner is correct that federal arbitrability law generally borrows state-law contract interpretation principles as part of its analysis, *see* Pet. Br. 42, "the law which ultimately results is federal." *Wiley & Sons*, 376 U.S. at 548; *cf. Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

Nonetheless, petitioner claims that by including a generic choice-of-law clause in their agreement, the parties "expressly agreed that New York law would govern the

interpretation and enforcement of their dispute." Pet. Br. 38, 42. That clause, however, expresses only the parties' choice of one state's laws over another's; it does not express a preference between federal and state law. *See Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001) (Becker, J.), *cert. denied*, 122 S. Ct. 545 (2001); *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (O'Scannlain, J.), *petition for cert. filed*, 71 U.S.L.W. 3002 (June 18, 2002) (01-1860); *Volt*, 489 U.S. at 489-90 (Brennan, J., dissenting). Otherwise, *every* federal law, including the FAA, would be inapplicable to *every* contractual relationship that included a choice-of-law provision.

Petitioner's contrary reliance on *Volt* is misleading because the Court in *Volt* deferred to the California state courts' interpretation of a contract. *See Volt*, 489 U.S. at 474; *id.* at 481 (Brennan, J., dissenting). When this Court later considered *de novo* the import of a New York choice-of-law clause in an arbitration agreement, the Court distinguished *Volt* on this very ground. *See Mastrobuono*, 514 U.S. at 60 n.4. The Court then held that the choice-of-law clause made New York law applicable to the substantive "rights and duties of the parties," but not to arbitrability issues. *Id.* at 64. As the Tenth Circuit recognized, it is *Mastrobuono*, not *Volt*, that controls here. *See* Pet. App. 22 (citing cases).

In any event, petitioner has cited *no* New York law favorable to her position, and instead has cited only to a New York case that misapplied *federal* law five years after the parties to this case signed their arbitration agreement. *See* Pet. Br. 42 (citing *Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997)). As the Tenth Circuit explained, the *Sacharow* court recognized that federal arbitration law applied notwithstanding the parties' New York choice-of-law clause. *See* Pet. App. 22 n.6; *Sacharow*, 689 N.E.2d at 888-89. In applying federal law, the New

York court correctly held that "the plain language of the NASD eligibility rule presents a question of arbitrability" because it "limits the subject of, entitlement to, and range of arbitrable matters." 689 N.E.2d at 886-87. But the state court then followed the Second and Eighth Circuit cases holding that parties to standard securities arbitration agreements "clearly and unmistakably" manifest an intent to arbitrate arbitrability. *See id.* at 887-88 (citing *Bybyk*, 81 F.3d at 1196-1202; *Freel*, 14 F.3d at 1312-13). As the Tenth Circuit explained, the New York court, like the Second and Eighth Circuits, erred as a matter of federal law by giving "insubstantial weight to the presumption established in *First Options*." Pet. App. 24a n.7.

In sum, the New York court simply followed the minority (and erroneous) lower-court approach to a question of federal law. Just as this Court is "in no way bound by state courts' answers to similar questions involving state law," *United States v. Craft*, 122 S. Ct. 1414, 1426 (2002), it is manifestly not bound by a state court's misapplication of federal law.

II. THE COURT SHOULD DISMISS THE PETITION AS IMPROVIDENTLY GRANTED.

The Tenth Circuit's decision is correct under the settled principles of law discussed above. Instead of affirming, however, this Court should dismiss the petition as improvidently granted. After this Court granted *certiorari*, the NASD and the SEC took action to amend Sections 10304 and 10324. *See* 67 Fed. Reg. 19,464 (Apr. 19, 2002). As a result, a decision by this Court in this case would have little practical significance.

The new rule embodies a compromise. As the SEC explains, the new rule provides that Section 10304 will be enforced by neither courts nor arbitrators. *See* SEC Br. 4 n.2. Instead, the rule will be independently enforced by the NASD Director of Arbitration, who will appoint an

arbitration panel to hear a dispute *only if* he or she first determines that the claim is eligible for submission. *See* 67 Fed. Reg. at 19,464-65. Signally, this compromise ensures that the decision is entrusted to an impartial individual at the threshold, rather than to a self-interested arbitration panel as part of its overall consideration of the case. It thereby confirms that the rule is intended to impose an efficient bar on arbitrators' jurisdiction, not merely a statute of limitations defense. Accordingly, the amendment buttresses Dean Witter's position that the current version of the rule should be independently enforced by courts, not arbitrators, unless the parties clearly and unmistakably agreed otherwise.

With the SEC poised to approve the amendment, however, a decision by this Court in this case would have little practical significance. Past proposals to amend Section 10304 languished because they were part of a broader package of amendments that included more controversial issues, including the availability of punitive damages. *See* 67 Fed. Reg. at 19,465-66 & n.8. After this Court granted *certiorari* in this case, however, the NASD severed the proposed amendment to Sections 10304 and 10324 from the other proposals and asked the SEC to approve that amendment alone. *See id.* at 19,466. The public comment period on the amendment has now ended, *see* SEC Br. 4 n.2, and the SEC is expected to approve it.

Given this anticipated amendment, a decision by this Court construing the current versions of Sections 10304 and 10324 would apply to only a handful of pending cases. The SEC suggests that this Court's decision would still have "some continuing significance," because the proposed rules "would apply only to arbitrations before the NASD, and would not change rules similar to the current NASD Rule 10304 that are in effect at other" self-regulatory organizations ("SROs"). SEC Br. 4 n.2. But as the SEC acknowledges, "the NASD conducts about 90% of SRO arbitrations." *Id.* Moreover, the reason that all SROs

currently have uniform rules is that the SEC strongly encourages uniformity. *See* Pet. Br. 14. Once the SEC approves the amended NASD rule, the other organizations will likely follow suit.

As a result, this case no longer warrants this Court's attention. As explained above, affirmance of the Tenth Circuit requires only the application of settled legal principles to a specific rule that will likely change in the near future. On the other hand, reversal would unsettle this Court's jurisprudence by departing from the parties' expressed intent in favor of an indeterminate analysis that would jeopardize the rights of all parties to arbitration agreements while confusing, not settling, this area of law. While such a course is never warranted, it is emphatically unwarranted on the fleeting facts of this case.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals or dismiss the petition as improvidently granted.

Respectfully submitted,

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